IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 8.

ORIGINAL.

IN THE MATTER OF THE

PETITION OF WILLIAM M. HENRY,

FOR WRIT OF HABEAS CORPUS.

PETITIONER'S BRIEF.

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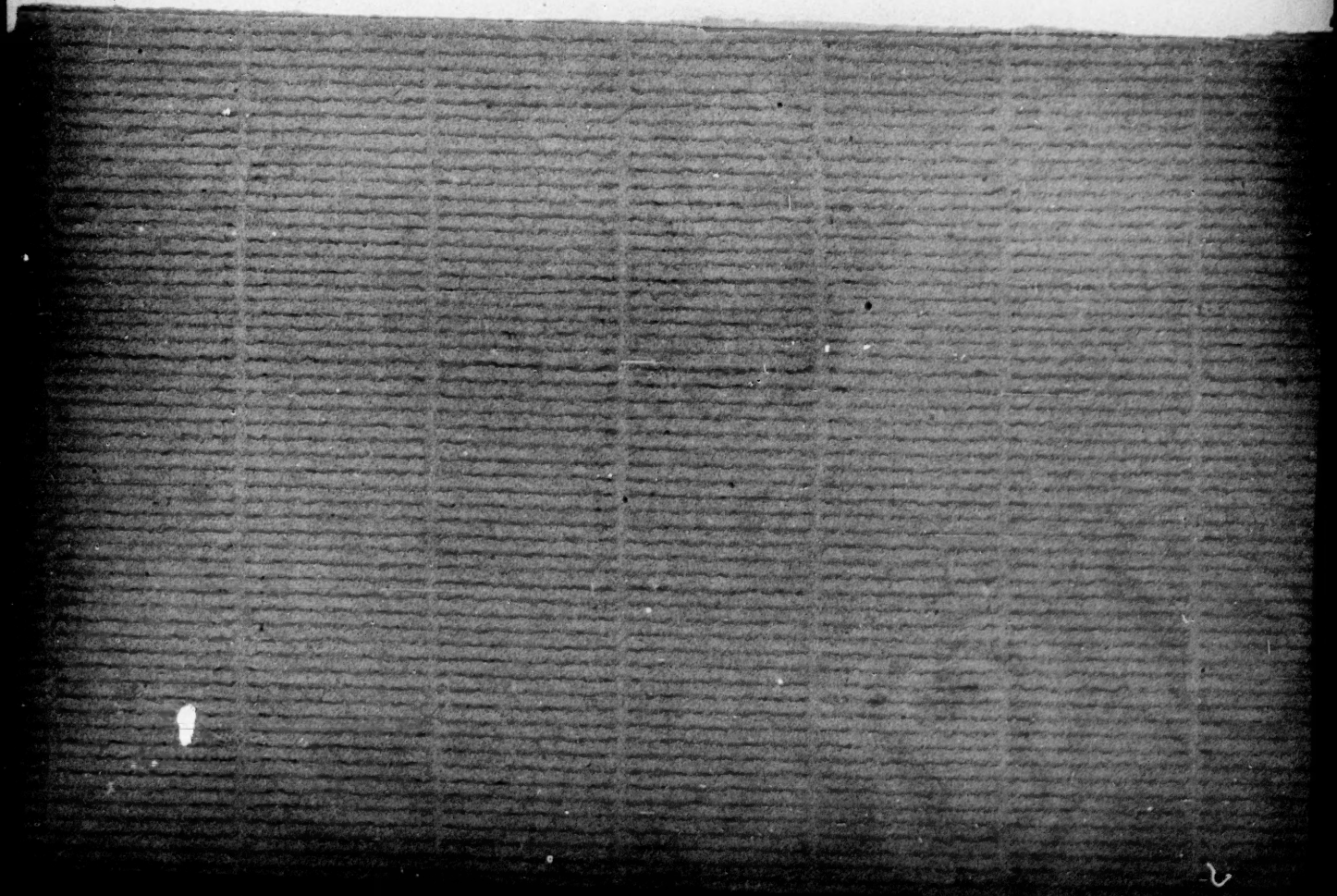

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The question involved in this application is, the right of the Court below to impose two distinct and separate sentences upon the petitioner, upon two distinct and separate indictments, both under Section 5480 of the Revised Statutes of the United States, charging offenses occurring within the same six calendar months, and found, tried, and sentences imposed at the same term of Court—the aggregate punishment being twenty-seven months imprisonment in the Penitentiary. 1

This brings up for construction, under the facts of these cases, the said Section of the Revised Statutes of the United States. It is as follows:

Revised Statutes of the United States—"Section 5480. If 2
"any person having devised or intending to devise any
"scheme or artifice to defraud, or be effected by either open-
"ing or intending to open correspondence or communication
"with any other person, whether resident within or outside
"of the United States, by means of the postoffice establish-
"ment of the United States, or by inciting such other per-
"son to open communication with the person so devising or
"intending, shall, in and for executing such scheme or arti-
"fice, or attempting so to do, place any letter or packet in
"any postoffice of the United States, or take or receive any 3
"therefrom, such person, so misusing the postoffice estab-

" lishment, shall be punishable by a fine of not more than five
" hundred dollars, and by imprisonment for not more than
" eighteen months, or by both such punishments. The in-
" dictment, information, or complaint may severally charge
" offenses to the number of three when committed within
" the same six calendar months; but the Court thereupon
" shall give a single sentence, and shall proportion the pun-
4 " ishment, especially to the degree in which the abuse of the
" postoffice establishment enters as an instrument into such
" fraudulent scheme and device."

It has been held that the word "or," in the expression "or be effected," in the second line of the section, is a clerical mistake for the word "to," and that the expression should be "to be effected."

Brand vs. U. S., IV Fed. Rep., p. 394.

Under the foregoing Statute the petitioner was indicted and
5 found guilty, at the August term, 1886, of the United States District Court for the Western District of South Carolina, upon two separate and distinct indictments, the first indictment charging three offenses and containing six counts, and the second indictment charging three offenses and containing three counts—all the offenses charged in both indictments being alleged to have been committed within the first six calendar months of the year 1886, to wit: in the month of March of said year. (Record, pp. 4–8; 18–20.)

After motions in arrest of judgment on both indictments,
6 and plea in bar to second indictment had been overruled, the Court sentenced the petitioner, upon the first indictment, to twelve months' imprisonment in the Penitentiary at Columbia, South Carolina, at hard labor; and, upon the second indictment, to imprisonment at hard labor, for the period of fifteen months, in the Penitentiary at Albany, in the State of New York—at the expiration of the sentence upon the first indictment. (Record, pp. 9, 20.)

As the defendant could not give bail, he entered, immediately, upon his imprisonment, to wit: on the 30th day of
7 September, 1886. (Record, p. 1.)

On writ of error, to the said District Court of the United

States, the Circuit Court of the United States, for said District, reversed both of said judgments and sentences, on the ground that the District Court had no right to impose "hard labor" as part of the punishment, but, at the same time, imposed new sentences upon the petitioner—the sentence in the first case being imprisonment in the South Carolina Penitentiary till the first day of October, 1887, (the petitioner having, already, been in said Penitentiary, under the sentence of the 8
District Court, since the 30th September, 1886,); and the sentence in the second case being imprisonment, upon the expiration of the sentence in the first case, for fifteen months in the Penitentiary at Albany, in the State of New York. (Record, pp. 16, 30.)

It will be seen from the foregoing that the petitioner has served out his first sentence of twelve months, under the first indictment, which expired on the first day of October, 1887; and that he is now held by the Marshal under the second sentence on the second indictment, of fifteen months imprisonment 9
in the penitentiary at Albany, State of New York. This is the illegality of which the petitioner *now* complains.

The illegality of the first indictment and first sentence is alleged by the petitioner, on various grounds in the petition herein, as reasons why the writ should be granted; but, inasmuch as the sentence has expired under the first indictment, the questions there raised are no longer practical, and will not be considered here. We shall, therefore, confine this discussion to the questions raised in the petition for the writ, as to the illegality of the second indictment and second 10
sentence.

How shall the Statute be construed? It being a penal statute, it must, according to the recognized canon of construction in such cases, be construed strictly. Perhaps the best exposition of the rule is that given by Chief Justice Marshall in delivering the opinion of the Court in the case of the United States vs. Wiltberger, 5th Wheaton, p. 93.

"The rule that penal laws are to be construed strictly, is, "perhaps, not much less old than construction itself. It is "founded on the tenderness of the law for the rights of indi- 11
"viduals; and on the plain principle that the power of punish-

" ment is vested in the legislative, not in the judicial depart-
" ment. It is the Legislature, not the Court, which is to define
" a crime, and ordain its punishment."

" It is said that, notwithstanding this rule, the intention of
" the law maker must govern in the construction of penal as
" well as other statutes. This is true. But this is not a new
" independent rule, which subverts the old. It is a modifica-
12 " tion of the ancient maxim, and amounts to this, that though
" penal laws are to be construed strictly, they are not to be
" construed so strictly as to defeat the obvious intention of
" the Legislature. The maxim is not to be so applied as to
" narrow the words of the statute to the exclusion of cases
" which those words, in their ordinary acceptation, or in that
" sense in which the Legislature has obviously used them,
" would comprehend. The intention of the Legislature is to
" be collected from the words they employ. Where there is
" no ambiguity in the words, there is no room for construc-
13 " tion. The case must be a strong one indeed, which would
" justify a Court in departing from the plain meaning of
" words, especially in a penal act, in search of an intention
" which the words themselves did not suggest. To deter-
" mine that a case is within the intention of a statute, its
" language must authorize us to say so. It would be danger-
" ous, indeed, to carry the principle, that a case, which is
" within the reason or mischief of a statute, is within its pro-
" visions, so far as to punish a crime not enumerated in the
" statute, because it is of equal atrocity, or of kindred char-
14 " acter, with those which are enumerated. If this principle
" has ever been recognized in expounding criminal law, it has
" been in cases of considerable irritation, which it would be
" unsafe to consider as precedents forming a general rule for
" other cases."

The rule, as stated above, was recognized and applied in the case of the United States vs. Morris, 14 Peters, p. 475, by Chief Justice Taney. To the same effect see

United States vs. Winn, 3 Sumner, p. 210.

15 United States vs. Hartwell, 6 Wall, p. 395.

There are, also, recognized principles of construction subordinate to the above, that:

1. Every word and clause must have a meaning.
2. Effect must be given to the whole.
3. There must be no repugnancy.
4. Injustice, absurdity and inconvenience must be avoided,

Bishop on Statutory Crimes (2nd Edition), Sec. 82. and authorities there cited. 16

It has, also, been said that the construction must be humane.

United States vs. O'Callahan, VI. McLean, p. 596.

Keeping clearly in view the above rules, let us proceed to an examination and analysis of the section (5480 of the Revised Statutes, United States,) in question.

The first paragraph, containing eleven and a half lines, defines the offense and the maximum punishment. If the 17
section contained no more than this paragaph, the construction put upon the whole section by the Court below might possibly be justified, because the offense is complete when, to effect a fraud, a person "places any letter or packet in any "postoffice of the United States, or takes or receives any "therefrom." So far as this first paragraph of the section is concerned, standing by itself, the offense can be committed *uno ictu*. But, mindful of the terrible consequences if a party were *prosecuted and punished for every act* (because people engaged in this sort of business usually send thou- 18
sands of fraudulent circulars through the mails and receive thousands in reply) the Legislature added a second paragraph, being the last six lines of the section, as follows, "The "indictment, information or complaint may severally charge "offenses to the number of three when committed within the "same six calendar months; but the Court thereupon shall "give a single sentence, and shall proportion the punishment "especially to the degree in which the abuse of the post- "office establishment enters as an instrument into such fraud- "ulent scheme and device." 19

This paragraph modifies the first paragraph of the section.

It limits the District Attorney, as to the extent of indictment, and restrains the Court, as to the power of sentence. It makes the offense, which, though capable of being committed *uno ictu*, yet, so far as *prosecution and punishment are concerned, continuous*—certainly, for the space of six months, before indictment found.

This last paragraph of the section may properly be called
20 the "Interpretation Clause." It sheds a full light upon what has gone before. Mr. Bishop defines it, and its force. He says:

"Not all Statutes have an interpretation clause. But, of "late, such a clause has become common, especially in Eng- "land. Ordinarily it occupies one section, sometimes more; "in some it is placed at the beginning, in others at the end. "Its effect may be to require a different interpretation from "what otherwise would be given the Statute, or even to im- "part a novel signification to particular words, and whatever
21 "in this respect it provides, the courts, as a general proposition, "to which there are, possibly, exceptions, are bound to ac- "cept." Bishop on Statutory Crimes, 2d Ed,. Sec. 54.

And, again, as to the construction of such a restraining clause:

"While the parts of a penal Statute which subject to pun- "ishment or a penalty are, from their odious nature, to be "construed strictly, those which exempt from penal conse- "quences will, because of their opposite character, receive a "liberal interpretation. Each entire Statute is not, necessa-
22 "rily, to be interpreted in one way, but the clauses will be dealt "with differently, when, from their natures, they are subject "to different rules. For example, an Act may be in part "penal and in part remedial, and then the penal part will be "construed strictly, and the remedial part liberally." Bishop on Statutory Crimes, 2d. Ed., Sec. 196.

With the above rules in mind we turn to this concluding, restraining clause of the section.

The first thing which strikes our attention is the use of the word, "The," in the phrase, "The indictment, information or
23 complaint," &c.

The Legislature in using the definite article, here, one of the uses of which, is, to limit a meaning more or less definitely, we submit, clearly indicated that not more than one indictment was to be filed for the six calendar months.

The next point to which we direct our attention is the language :

"The indictment, information, or complaint, may severally
"charge offenses to the number of three when committed 24
"within the same six calendar months."

It is submitted that to "*severally charge* three offenses in one indictment is the legal equivalent of indicting a party in three separate and distinct indictments; each indictment charging one offense, and, afterwards, consolidating such three indictments, so as to make one indictment containing three offenses; so that, when the offenses are committed within the same six calendar months, the District Attorney may indict three times, being required, however, to include the three charges which he may select as the basis of prose- 25
cution in one "indictment," "information" or "complaint." This construction is borne out by the language following limiting the power of the Court as to sentence.

"But the Court thereupon shall give a single sentence,
"and shall proportion the punishment especially to the degree
"in which the abuse of the postoffice establishment enters as
"an instrument into such fraudulent scheme and device."

We see from the foregoing that, notwithstanding the fact that a party may be convicted, as to all the offenses, upon an indictment severally charging three offenses, yet the Court 26
can give but "a single sentence"—thus, practically, making unpunished and unpunishable two of the offenses of which the party may have been convicted. Now, if the party stands guilty of two offenses severally charged, for which the Court is restrained by the Statute from awarding punishment, where's the logic, under the Statute, in the District Attorney going to work to indict and try a party for some more offenses committed within the same six calendar months, when he has been already convicted, under the first indictment, of two offenses severally charged, for which the Court, by the Statute, 27
cannot award punishment? If the Statute had intended that

more than one sentence should be imposed for offenses committed within the same six calendar months, it would not have limited the Court to "a single sentence"—it would, in this regard, have been silent. But the Statute goes further; it furnishes to the Court a rule, or test, by which the punishment shall be admeasured, in the following language: "And
" shall proportion the punishment especially to the degree in
28 " which the abuse of the postoffice establishment enters as an
" instrument into such fraudulent scheme and device.

How is the Court to ascertain "the degree" of abuse of the postoffice? From the three offenses severally charged? Assuredly not. That would afford little light; but rather from the whole evidence—how long the party had been making use of the postoffice in such fraudulent way; the number of fraudulent letters and circulars sent and received; the size of his daily mail; the number of letters containing answers to his fraudulent circulars—seized by the authorities
29 in his mail-box and house; and, in short, every fact bearing on the fraudulent business, its extent and duration, and, in the language of the statute, showing "the degree" in which it abused the postoffice establishment. From the foregoing it seems clear that not every act should be the subject of indictment, but only a sufficient number to *meet the proofs and ensure conviction*, viz: "three, when committed within the same six calendar months."

As to all other acts and facts, they should simply be a guide and light to the Court in "proportioning the punish-
30 ment" within the limitation prescribed by the statute; and the sum total of this punishment was "thereupon" to be included in a "single sentence."

If the construction put upon this act by the Court below could prevail, the party might be indicted a hundred times, with a maximum punishment of one hundred and fifty years imprisonment and fifty thousand dollars fine.

Such a construction, we submit, would be repugnant to humanity; and yet it is the logical result of indicting the
31 petitioner twice, as was done in the Court below; for, if two indictments and two sentences for offenses committed within

the same six calendar months can prevail, why not an indefinite number?

As having a direct bearing on this discussion we quote the language of the Court in the case of "The United States vs. "Timothy O'Callahan," VI. McLean, p. 598: "I should be "extremely reluctant, where an offense was committed under "a law in several distinct ways by the same transactions, to "hold the defendant punishable under each. This would be 32
"contrary, it seems to me, to the genius of our laws, and the "humanity which characterizes them."

And, again, in a more recent case:

"It is to prevent such an application of penal laws that the "rule has obtained, that a continuing offense of the charac- "ter of the one in this case can be committed *but once for the "purposes of indictment or prosecution prior to the time the pros- "ecution is instituted.*" *In re* Snow, 120 U. S., p. 282.

The whole question is here discussed, and a number of cases cited, amongst them the case of Crepps vs. Durden, in 33
which Lord Mansfield gives the test of whether a crime, which may be committed by several distinct acts, is continuous or not. He said:

"*If the Act of Parliament gives authority to levy but one pen- "alty, there is an end of the question; for there is no penalty at "common law.*"

And, again: "*No case is cited where what has been done in "the present case has been held to be lawful. But the uniform "current of authority is to the contrary, both in England and "in the United States.*" 34

In addition to the above, the Circuit Court of the United States, for the Western District of Wisconsin, has passed upon this identical section (5480 of the Revised Statutes United States), and adopts the construction for which we contend. We quote from the charge of the Court to the jury:

"It appears, from the evidence, that the defendant has once "before, at the last June Term, been before this Court on a "similar charge, the offense alleged to have been committed "in March or April last, and that he plead guilty to the in- 35
"formation, and was thereupon convicted and punished. As

"I have already told you on the trial, the defendant cannot "be again convicted of the offense charged in that case. "There is no thought, or attempt, on the part of anybody to "do this. THAT CONVICTION MAY BE TAKEN BY YOU AND CON- "SIDERED AS A COMPLETE BAR TO ANY UNLAWFUL USE OF THE "POSTOFFICE DEPARTMENT PRIOR TO JUNE, WHEN THAT IN- "FORMATION WAS FILED," &c.

36 The United States vs. Stickle, XV. Federal Reporter, pp. 801–802.

From the foregoing, we submit that it has been shown that the Court below had no right to entertain the second indictment and impose a second sentence for offenses committed, and charged to have been committed in the said second indictment, within the same six calendar months as those alleged in the first indictment; and that, in so doing, it exceeded its jurisdiction. And, inasmuch as the first sentence of twelve months' imprisonment in the Columbia Penitentiary expired
37 on the 1st day of October, 1887, and the second sentence of fifteen months' imprisonment in the Penitentiary at Albany, State of New York, is now being enforced, the petitioner is entitled to his remedy by writ of *habeas corpus*.

The following authorities sustain this position:

Article V. of Articles in Addition to, and Amendment of The Constitution of the U. S.
Revised Statutes U. S., Secs. 751–766.
Ex parte Milligan, 4 Wall, p. 2, 142.
Ex parte Lange, 18 Wall, p. 163, 178.
38 *Ex parte* Clarke, 100 U. S., p. 399, 422.
Ex parte Yarbrough, 110 U. S., p. 651, 666.
Ex parte Wilson, 114 U. S., p. 417, 429.
In re Snow, 120 U. S., p. 274, 287.
Ex parte Bain, 121 U. S., p. 1, 14.

In every one of these cases it was distinctly decided that, where the inferior Court exceeded its jurisdiction, or power of sentence, the writ would issue.

The principle is well stated by Mr. Justice Blatchford,
39 in delivering the opinion of the *unanimous* Court in the case of *in re* Snow, above cited, at page 285 (120 U. S.) "Not

"only had the Court which tried them no jurisdiction to in-
"flict a punishment in respect of more than one of the con-
"victions, but as the want of jurisdiction appears on the face
"of the judgment, the objection may be taken on *habeas*
"*corpus*, when the sentence on more than one of the convic-
"tions is sought to be enforced."

In conclusion it is respectfully submitted in the language of Mr. Justice Miller, in *ex parte* Lange, above cited, at page 40
178, (18 Wall.) "There is no more sacred duty of a Court
"than, in a case properly before it, to maintain unimpaired
"those securities for the personal rights of the individual
"which have received for ages the sanction of the jurist and
"the statesman; and in such cases no narrow or illiberal
"construction should be given to the words of the funda-
"mental law in which they are embodied. Without straining
"either the Constitution of the United States, or the well set-
"tled principles of the common law, we have come to the
"conclusion that the sentence of the Circuit Court under 41
"which the petitioner is held a prisoner was pronounced
"without authority and he should therefore be discharged."

ISAAC M. BRYAN,
Counsel for Petitioner.

Greenville, S. C., October 21st, 1887.